Mediation in Copyright Disputes: From Compromise Created Incentives to Incentive Created Compromises*

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The notion that ordinary people want black-robed judges[,] well[-] dressed lawyers[,] and fine courtrooms as settings to resolve their disputes is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible.[1]

I. INTRODUCTION

The history of American copyright law is largely a story of a constitutional compromise—a balance between the need to provide incentive for the creative process and the need for public access to the products thereof.[2] This compromise,

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[1] Dina R. Janerson, *Representing Your Clients Successfully in Meditation: Guidelines for Litigators*, N.Y. LITIGATOR, Nov. 1995, at 15 (quoting Chief Justice Burger, Address at the Chief Justice Earl Warren Conference on Advocacy: Dispute Resolution Devices in a Democratic Society (1985)).

[2] As one scholar has noted:

> To encourage authors to create and disseminate original expression, it accords them a bundle of proprietary rights in their works. But to promote public education and creative exchange, it invites audiences and subsequent authors to use existing works in every conceivable manner that falls outside the province of the copyright owner's exclusive rights. Copyright law's perennial dilemma is to determine where exclusive rights should end and unrestrained public access should begin.

Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996).

shaped in part by the antecedent "copyright" law of eighteenth-century England,[3] has its American foundation in Article I, section 8 of the Constitution.[4] That section affords Congress authority to strike the balance by granting authors "the exclusive Right" to their creative works while granting public access to those works upon the expiration of "limited Times."[5]

Embracing these notions of compromise and incentive, mediation has emerged in recent years as a means of resolving disputes short of adjudication.[6] Notwithstanding its growing popularity, however, mediation remains generally overlooked as an alternative to litigating copyright disputes.[7] This fact is unfortunate given the numerous advantages associated with copyright mediation, including the ability to preserve financial resources, the opportunity to formulate creative business solutions, and the occasion to avoid the uncertainties of

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[3] Enacted in 1710, the Statute of Anne was a "modest effort to recognize the rights of authors. Much of the preceding law of 'copyright' was directed primarily to protecting the interests of printers and serving as a means of state censorship and control over the printed word." SHELDON W. HALPERN, COPYRIGHT LAW: PROTECTION OF ORIGINAL EXPRESSION 5 (2002).

[4] U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have Power . . . To promote the Progress of Science . . . securing for limited Times to Authors . . . the exclusive Right to their . . . Writings . . . .").

[5] *Id.* The 1998 Amendment to the Copyright Act expanded "limited Times" to contemplate the life of the author plus seventy years. 17 U.S.C. § 302(a) (2000). The Act further limits the exclusive rights of copyright owners by enumerating a number of exceptions to copyright infringement, such as the use of copyrighted works for "fair use" purposes. *Id.* § 107–22.

[6] *See, e.g.*, Bernard v. Galen Group Inc., 901 F. Supp. 778, 779 (S.D.N.Y. 1995) (referring a copyright case, over the plaintiffs' objections, to mediation). As the 1976 Copyright Act abolished state copyright law, copyright matters fall within the exclusive jurisdiction of the federal courts. Such courts, in turn, are subject to the Alternative Dispute Resolution Act of 1998, which requires federal courts "to provide litigants in all civil cases with at least one alternative dispute resolution process, including . . . mediation," [and] expressly directs the courts to adopt local rules "provid[ing] for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications." Sheldone v. Pennsylvania Tpk. Comm'n, 104 F. Supp. 2d 511, 513 (W.D. Pa. 2000) (quoting 28 U.S.C. § 652(d)); *see also* Andy Y. Sun, *From Pirate King to Jungle King: Transformation of Taiwan's Intellectual Property Protection*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 67, 123 (1998) (noting that, as an alternative means of resolving copyright disputes, "the Copyright Commission points to the newly enacted Copyright Mediation and Arbitration Organization Law").

[7] *See* Scott H. Blackmand & Rebecca M. McNeill, *Alternative Dispute Resolution in Commercial Intellectual Property Disputes*, 47 AM. U. L. REV. 1709, 1710 (1998) ("While ADR has become more prevalent in other areas of the law, many intellectual property attorneys do not regularly consider ADR as one of their options.").

copyright litigation.[8] Indeed, these incentives illuminate an inverse, yet symmetrical relationship between mediation and the law of copyright—that is, whereas the law of copyright is founded on a compromise that promotes creative incentive, mediation is driven by incentives that promote creative compromise.

This article posits that copyright disputes are not only well suited for mediation, but that such disputes are more "mediation-friendly" than non-intellectual property cases. Part II provides a background on both the mediation process and the law of copyright. Part III details the advantages associated with employing mediation as an alternative to copyright litigation. Part IV addresses the arguments offered by opponents to copyright mediation and accounts for its infrequent use in the law of copyright. Finally, Part V suggests an approach for determining the circumstances under which mediation is appropriate for resolving copyright disputes.

II. MEDIATION AND THE LAW OF COPYRIGHT

A. *Mediation: A Process of Alternative Dispute Resolution*

The alternative dispute resolution field incorporates any procedure for settling disputes by means other than litigation.[9] Such procedures are frequently distinguishable by the degree of control that parties maintain over the settlement process and the dispute's ultimate outcome.[10] The most common form of dispute resolution is negotiation, which affords parties the power of control over both the settlement process and the dispute's outcome.[11] Alternatively, parties unable to reach agreement by negotiation may engage in arbitration—an adjudicative form of dispute resolution in which the parties concede authority to a neutral third person that assumes control over the outcome and, to varying degrees, over the process as well.[12] Mediation, in contrast to negotiation and arbitration, provides a middle-ground on which parties may resolve their disputes by ceding control of

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[8] *See infra* Part III. The outcome of copyright cases is frequently difficult to predict when the fair use doctrine, the inverse ratio rule, and the idea-expression dichotomy are at issue.

[9] BLACK'S LAW DICTIONARY 62 (7th ed. 1999).

[10] STEPHEN B. GOLDBERG, FRANK E.A. SANDER & NANCY H. ROGERS, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 3 (3d ed. 1999) ("[C]ontrol over outcome is only one significant criterion for differentiating among third-party processes.").

[11] *Id.*

[12] Arbitration, similar to court proceedings, is a form of adjudication in which parties present evidence and make legal arguments. *Id.* Unlike a court proceeding, however, arbitration is presided over by a neutral third-person, called an arbitrator, who, at the completion of the arbitration, may render a binding judgement. *Id.*

the process to a neutral third-person while retaining control over the dispute's ultimate outcome.[13]

1. *The Mediation Process*

Mediators typically employ a step-by-step procedure to facilitate parties toward settlement.[14] These steps—which vary with different mediation programs—generally include the arrangement of the mediation, the mediator's opening statement, a presentation by each party, a negotiation of the relevant issues, and an ultimate agreement.[15] At each stage of the mediation, the mediator attempts to gain the trust of the parties by proceeding in an impartial and deferential manner.[16] The mediator also encourages the free flow of information in his or her opening statement by explaining the confidential nature of the process, the ground rules for uninterrupted dialogue, and the mediator's lack of authority to render a binding judgment.[17] This free flow of information—ideally exercised in the parties' initial presentations and continuing throughout the mediation—frequently results in the parties gaining a greater understanding of their adversary's position.[18]

Drawing on such understanding and the parties' desire to resolve the dispute short of litigation, the mediator then attempts to engage the parties in negotiation by inquiring of possible solutions to which the parties may be amenable.[19] In the event that parties reach impasse, the mediator may employ numerous techniques to generate movement, such as drawing attention to the time, expense, and risk associated with litigation or identifying the weaknesses of a party's case in

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[13] In this respect, mediation is frequently the by-product of a failed negotiation. *See* NANCY H. ROGERS & RICHARD A. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW 9 (1987). Provided parties are not able to reach agreement through mediation, arbitration is frequently the next step in resolving a dispute short of litigation.

[14] *Id.* at 13 (noting that although mediation is a sequential process, "it is also cyclical and self-reinforcing").

[15] *Id.* at 14.

[16] *See In re* Fla. R. Civ. Pro., 641 So. 2d 343, 349 (Fla. 1994) (per curiam) ("A mediator occupies a position of trust with respect to the parties and the courts.").

[17] ROGERS & SALEM, *supra* note 13, at 20–21.

[18] Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1308 n.78 (1998) (noting that mediators "may be able to take immediate steps to move the parties toward better communication and eventual mutual understanding").

[19] *See* ROGERS & SALEM, *supra* note 13, at 30.

caucus.[20] Assuming further impasse is avoided, the mediator will facilitate negotiation until settlement is reached,[21] at which time the resolution is reduced to a signed, binding agreement.[22]

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[20] "Caucus" refers to the process by which a mediator meets with parties privately during a mediation to encourage candor and to formulate creative solutions. *Id.* at 33 (noting that the mediator may, if necessary, act as an "agent of reality"); *Recommendation 88-11 of the Administrative Conference of the United States*, 41 ADMIN. L. REV. 357, 358 (1989) (stating that caucusing encourages candor and raises sensitive and creative ideas).

[21] If the mediation is unsuccessful, the mediator may attempt to salvage any progress by recording stipulated facts or resolved issues. ROGERS & SALEM, *supra* note 13, at 39. Moreover, the parties "may have learned to negotiate better and may, in fact, settle unresolved issues themselves later." *Id.*

[22] The enforceability of mediation agreements is frequently critical to both securing party attendance at the mediation and obtaining ultimate resolution. JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 419 (2d ed. 1996). Perhaps because "[s]ome advocates of community dispute mediation do not view legal enforceability as central to its objectives," a common misapprehension is that mediation agreements are merely aspirational and not binding on parties. *Id*; *see also* John W. Welch, *Practical Guide to Forming a Partnership in Utah*, 12 BYU J. PUB. L. 111, 134 (1997) ("The most significant downside of mediation is that there is no means of enforcing any agreement reached by the parties."); Cathleen Cover Payne, Note, *Enforceability of Mediated Agreements*, 1 OHIO ST. J. ON DISP. RESOL. 385, 385–86 (1986) (noting that although mediated agreements generally reflect the specific individual desires of the parties, some parties will still fail to comply with their agreements). Yet although the unenforceability of mediation agreements may not dissuade parties to a family or church dispute, commercial litigants have a strong incentive and, indeed, an "expectation . . . that any agreement reached will be a legally enforceable contract, and it is usually drawn up by lawyers." MURRAY ET AL., *supra*, at 419–21.

Putting these misapprehensions to rest, mediation agreements are enforceable to the extent they satisfy the requirements of contract law. Furthermore, "[t]he general policy favoring enforcement, and specific policies underlying certain causes of action, may enhance enforceability." *Id.* at 420 (citing Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207, 1209 (5th Cir. 1981) and Strange v. Gulf & South Am. Steamship Co., 495 F.2d 1235, 1237 (5th Cir. 1974)). Nevertheless, some states (and, indeed, the Uniform Mediation Act) impose a writing requirement to secure the enforceability of a mediation agreement. Still others provide that such agreements are not binding unless the agreement includes specific written advisories and "a provision stating that it is binding." MINN. STAT. ANN. § 572.35 (West 2001).

Provided there is compliance with the applicable statutory requirements, enforceability of an agreement is governed by reference to contract law. MURRAY ET AL., *supra*, at 421. Such agreements, therefore, must have consideration and the mutual assent of the parties. Although "[c]onsideration is rarely a problem since a mediation agreement will generally involve a bargained-for exchange," parties may challenge agreements for want of mutual assent based on duress, mistake, or fraud. *Id.*

As a practical matter, the method of ensuring compliance with a mediation agreement varies depending on whether the mediation was "pre-filing" or "post-filing." In pre-filing mediation, parties voluntarily agree to mediation before filing suit. To accommodate such parties, mediation centers frequently "retain the agreement in their files and offer their services

2. *The Facilitative and Evaluative Models of Mediation*

In the classic, non-directive form of mediation, the mediator assumes a merely facilitative role, refraining from interjecting his or her views, values, or solutions into the negotiation process.[23] This form of facilitative mediation discourages mediators from providing an evaluation or estimate of the parties' case.[24] Proponents of the facilitative model argue that evaluative mediation—commonly referred to as "muscle mediation"—diminishes the extent to which mediation is the "process of the parties" because disputants are unlikely to propose their own solutions and, consequently, are less likely to comply with their agreement in the future.[25]

Nevertheless, the increasing role of lawyers and former judges as mediators has caused a proliferation of evaluative mediation in recent years.[26] This correlation is largely attributable to the mediators' view that they were selected to participate in the mediation process because of their familiarity with the litigation system.[27] As a result, such mediators are more inclined to evaluate disputes rather than merely facilitate parties toward settlement.[28]

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in helping to assure compliance," such as "hold[ing] in escrow sums of money to be paid by one party until the other party complies with its part of the agreement." *Id.* at 420. Post-filing mediation, by contrast, occurs when a judge or magistrate refers an already-filed lawsuit to mediation (although the parties may voluntarily arrange a post-filing mediation as well). Provided agreement is reached, the judge or magistrate may schedule a new trial date or otherwise retain jurisdiction over the case to afford parties immediate judicial recourse in the event of non-compliance.

[23] MURRAY ET AL., *supra* note 22, at 362.

[24] *Id.*

[25] One mediator observed the following of "muscle mediation":

> When the mediator has the power to decide the dispute he may coerce the parties into a settlement. This may compromise the value of the mediation. "What appears to be a negotiated resolution may be perceived by the parties as an imposed one, thus diminishing the degree of satisfaction and commitment." This kind of mediation then becomes "muscle-mediation." The desire that a settlement be the product of the "free will" of the parties, without the immediate pressure of a decision to one's disadvantage will not be satisfied.

James T. Peter, *MED-ARB in International Arbitration*, 8 AM. REV. INT'L ARB. 83, 94–95 (1997) (citations omitted).

[26] MURRAY ET AL., *supra* note 22, at 361–62.

[27] *Id.* at 362.

[28] *Id.*

In practice, much of present-day mediation is a hybrid of the facilitative and evaluative models.[29] Under the facilitative model, for example, mediators may engage in a quasi-evaluative role to break impasse by discussing the vulnerable areas of a party's case in caucus.[30] Conversely, an evaluative mediator may proceed in a more facilitative fashion when the parties appear more apt to reach settlement by their own efforts. Whatever the interplay, the degree of facilitative and evaluative techniques employed by the mediator provides disputants with varying advantages depending on the specific nature of the dispute.[31]

B. *Copyright Law: Protection of Fixed and Original Expression*

The law of intellectual property typically includes the three areas of copyrights, patents, and trademarks.[32] Aside from the highly amorphous concept of "property," however, these areas have relatively little in common.[33] Patents and trademarks, for example, protect novelty of invention and marks indicating the source or origin of goods, respectively.[34] Copyright law, by contrast, protects original works of authorship fixed in a tangible medium of expression.[35] Given the marked disparities between these fields, the advantages of mediating intellectual property disputes are, to some extent, dependent on the specific area of intellectual property at issue.

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[29] *Id.* ("However, much of mediation today is something of a hybrid, with the mediator using the techniques that seem to be called for in the particular context.").

[30] ROGERS & SALEM, *supra* note 13, at 33 ("If the parties remain in a competitive negotiating posture despite the mediator's efforts to create a cooperative environment, the mediator may have to de-emphasize the role of 'empathic listener' and move into other roles.").

[31] *See id.* at 32–33.

[32] *See* DONALD S. CHISUM & MICHAEL A. JACOBS, UNDERSTANDING INTELLECTUAL PROPERTY LAW § 1B, at 1-3 (1992) (stating that the field of intellectual property includes utility patents, copyrights, and trademarks). In addition, the umbrella of "intellectual property" frequently encompasses the fields of false advertising, trade secrets, misappropriation, and publicity rights. *Id.*

[33] HALPERN, *supra* note 3, at 3 ("Copyright, patent, and trademark each are distinct bodies of law, sharing some common ideas, but fundamentally different from one another.").

[34] The Patent Act defines a patentable invention as a "process, machine, manufacture, or composition of matter" that is new, useful, and non-obvious. 35 U.S.C. §§ 101–03 (2000). Trademark law, unlike patent law, "does [not] depend upon novelty, invention, discovery, or any work of the brain. It requires no fancy or imagination, no genius, no laborious thought . . . It is simply founded on priority of appropriation." *In re* Trade-Mark Cases, 100 U.S. 82, 94 (1879).

[35] 17 U.S.C.S. § 102 (2000).

1. *Fundamentals of Copyright Law*

The most recent exercise of congressional authority to secure copyright protection was the 1976 Copyright Act, in which Congress expanded both the scope of copyright protection and the period for which copyright protection endures.[36] This period, beginning at the moment an author records a work in a fixed tangible medium, endures for the life of the author and the seventy years thereafter.[37] Although registration of a copyrighted work with the United States Copyright Office provides the author with numerous advantages at trial, only the fixation of an original work is required to secure copyright protection.[38]

Upon the attachment of copyright protection, the Copyright Act grants the author a bundle of exclusive and independent rights, including the right to reproduce the work, to prepare derivative works, and to perform the work.[39] As these rights are both exclusive and independent, the copyright owner maintains the power to exclude others from exercising the rights, but may assign or license any one right independently of the others.[40] The unlawful exercise of any such right permits the copyright owner to sue for injunctive relief, damages (including treble damages for willful infringement), and attorneys' fees.[41]

A copyright owner exercising the right to sue for infringement bears the burden of proving (1) ownership of a valid copyright in the work and (2) an unauthorized exercise of an exclusive right.[42] Registration of a copyrighted work with the United States Copyright Office provides a rebuttable presumption of valid copyright ownership, thereby satisfying the first requirement in most

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[36] *Id.* §§ 101–22.

[37] *Id.* § 302(a). This term of copyright duration applies for works created on or after January 1, 1978. *Id.*

[38] Section 102 of the Copyright Act, in pertinent part, provides that "[c]opyright protection subsists . . . in *original works of authorship fixed in any tangible medium of expression*, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Id.* § 102(a) (emphasis added).

[39] *Id.* § 106(1), (2), (4). The bundle of exclusive rights also includes the right to distribute copies of the work, to display the work, and, "in the case of sound recordings, to perform the copyrighted work publicly by means of digitally audio transmission." *Id.* § 106 (3), (5), (6).

[40] HALPERN, *supra* note 3, at 8.

[41] *See* 17 U.S.C. §§ 502, 504–05 (2000).

[42] Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) ("To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.").

cases.[43] Absent this presumption, the plaintiff must prove such ownership by establishing the work as "original,"[44] "fixed" in a tangible medium of expression,[45] and a work of that "author."[46] Even if the plaintiff is able to establish ownership of a valid copyright, however, the plaintiff often has difficulty in proving an unauthorized exercise of an exclusive right due to the "fair use" defense.

2. *The Fair Use Doctrine*

Balancing the exclusive rights that the Copyright Act affords copyright authors, the Act concomitantly reserves to the public the right to use copyrighted material for "fair use" purposes.[47] The doctrine of fair use, dubbed "the most troublesome in the law of copyright,"[48] is an intrinsically nebulous and ad hoc principle that eschews "rigid application of the copyright statute when, on occasion, it would stifle the very creativity which [the] law is designed to

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[43] 17 U.S.C. § 410(c); *see, e.g.*, Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1075 (9th Cir. 2000) ("Under the copyright laws, [the plaintiff's] certificate of registration from the U.S. Copyright Office entitled him to a 'rebuttable presumption of originality' with respect to the photographs at issue."); Hi-Tech Video Productions, Inc. v. Capital Cities/ABC, Inc., 58 F.3d 1093, 1095 (6th Cir. 1995) (noting that the plaintiff's certificate of copyright "creates a presumption of the copyright's validity").

[44] Originality is the *sine qua non* of copyright. *Feist*, 499 U.S. at 345. For purposes of the Copyright Act, the term "original" means "independently created by the author" and possessing "at least some minimal degree of creativity." *Id.*; *see generally* Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n., 805 F.2d 663, 667 (7th Cir. 1986). Although creativity is an integral part of the concept of originality, "the requisite level of creativity is extremely low." *Feist*, 499 U.S. at 345.

[45] Section 101 of the Copyright Act provides that "[a] work is 'fixed' in a tangible medium of expression when its embodiment in a copy . . . is sufficiently permanent or stable . . . to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101. Thus, copyright protection subsists in original works of authorship merely if the work is "fixed" in a sufficiently stable medium, regardless of the form of that fixation.

[46] Article I, section 8 of the Constitution provides that "congress shall have the power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art I, § 8, cl. 8. In construing this provision, the United States Supreme Court has interpreted an "author" as one "to whom anything owes its origin." Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884) (quotations omitted). As individuals to whom pictures and text own their origin, photographers and writers are thus "authors" for purposes of copyright law. *Id.*

[47] 17 U.S.C. § 107 (2000).

[48] Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939).

foster."[49] As a judge-made concept,[50] the fair use doctrine was historically a means of validating otherwise infringing activity in the areas of news reporting, literary comment and criticism, education, and parody.[51] The 1976 Copyright Act, codifying this judicial construct, bifurcates the fair use provision into a preamble and an enumeration of four factors that flesh out its general purpose.[52]

Despite this seemingly coherent and straightforward codification, courts have oft-confounded the relationship between the preamble and the factors, leading to an inconsistent and frequently illogical application of the fair use doctrine.[53] Indeed, even the Supreme Court justices have approached the fair use provision from fundamentally different perspectives,[54] to say nothing for the confusion existing in the lower courts.[55] At bottom, this inconsistency has left the boundaries of fair use largely undefined, resulting in uncertainty and risk for would-be litigants.[56] It is within the fair use context (and the context of several other ambiguous copyright issues)[57] that mediation provides one of the primary benefits to copyright disputants.

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[49] Stewart v. Abend, 495 U.S. 207, 236 (1990) (quoting Iowa State Univ. Research Found., Inc. v. American Broad. Cos., 621 F.2d 57, 60 (2d Cir. 1980)).

[50] Emerson v. Davies, 8 F. Cas. 615, 619 (Mass. C.C.D. May 1845).

[51] For a comprehensive discussion on the "fair use" doctrine, see Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 574–94 (1994).

[52] The four factors consist of:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107.

[53] *Cf.* Sony Corp. of Am. v. Univ. City Studios, Inc., 464 U.S. 417, 464–500 (1984) (holding that a commercial or profit-making use of copyright work is presumptively *not* a "fair use,"—a notion that, by all appearances, was rejected in *Campbell*, 510 U.S. at 578–94).

[54] *Compare Campbell*, 510 U.S. at 578–94 (Souter J.), *and Sony*, 464 U.S. at 464–500 (1984) (Blackmun, J., dissenting), *with* Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 545–69 (1994) (O'Connor J.), *and Sony*, 464 U.S. at 429–56 (Stevens, J.).

[55] HALPERN, *supra* note 3, at 419 ("The power of the *Sony* presumptions as perceived by the lower courts ultimately produced reexamination in *Campbell*, . . . in which the Court seems to say . . . that the lower courts have misinterpreted *Sony* . . . .").

[56] *Id.* at 400.

[57] Although the fair use defense accounts for much of the disconcertment in contemporary copyright law, several related issues also provide the copyright disputant with particular difficulty at trial—namely, the means of circumstantially proving infringement and the idea-expression dichotomy. *Id.* at 51 ("[S]ophisticated analysis frequently is necessary to separate protected 'expression' from unprotected 'idea.'"). The first of these issues—the means of

III. ADVANTAGES TO MEDIATING COPYRIGHT DISPUTES

The principles discussed in Part II converge to make copyright disputes more suitable for mediation than the "average" dispute. Copyright disputes are suitable for mediation because mediation enables parties to (1) circumvent the unusually high cost of copyright litigation; (2) "share" copyrighted works; (3) avoid litigating ambiguous or adverse copyright issues; (4) preserve the business relationships and reputations of copyright disputants; and (5) select copyright experts as evaluative mediators.

A. *Expedient and Inexpensive Resolution*

Perhaps the most obvious incentive to mediating copyright disputes is the opportunity to curb the unusually high cost of copyright litigation. According to a

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proving infringement circumstantially—arises when the copyright plaintiff is unable to make a showing of direct infringement. In such a case, the copyright plaintiff must prove (1) a substantial similarity between the original work and the allegedly infringing work and (2) the infringer's access to the original work. *See* Three Boys Music Corp. v. Bolton, 212 F.3d 477, 486 (9th Cir. 2000); Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996). Interpreting these concepts, courts have constructed an inverse ratio rule in which "substantial similarity" and "access" are considered reciprocal concepts; hence, a lesser showing of substantial similarity is required when a higher degree of access is demonstrated and vice versa. *Bolton*, 212 F.3d at 486 ("The Ninth Circuit's inverse-ratio rule requires a lesser showing of substantial similarity if there is a strong showing of access."). Because of the abstract and subjective nature of these concepts, however, copyright disputants frequently incur a significant risk when litigating substantial similarity and access issues.

Similarly, copyright litigants involved in disputes concerning the expression-idea dichotomy frequently assume a significant risk at trial. Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 465 ("The problem, of course, is that the idea/expression line has proved difficult or impossible to draw in practice."). The idea-expression dichotomy posits that "copyright protection covers only the expression of ideas and not the ideas themselves." Chuck Blore & Don Richman Inc. v. 20/20 Advertising Inc., 674 F. Supp. 671, 676 (D. Minn. 1987). In reality, however, the idea-expression dichotomy is akin to a spectrum complicated by the "confluence of two well-established principles: (1) copyright protection for a work extends beyond merely verbatim or literal copying . . . and (2) . . . 'The mere fact that a work is copyrighted does not mean that every element of the work may be protected.'" HALPERN, *supra* note 3, at 51 (quoting Feist Publ'g, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991)). As a result, "[w]hen one is alleged to have infringed another's work, it is frequently necessary to determine where, on that spectrum, the material allegedly taken lies." *Id.* This determination, similar to the charge of predicting outcomes in the fair use and inverse ratio context, can thus be a daunting task for copyright litigants at trial. Nevertheless, the use of mediation in such disputes—as discussed in the following section—may afford parties an alternative process by which to alleviate such enterprises.

recent study, the median cost of a copyright infringement suit is $100,000 through discovery and $200,000 through trial.[58] Further, "the cost of copyright infringement suits is rising with the increased necessity to use expert witnesses and the increased complexity of the issues being litigated."[59] The average cost of mediation, by contrast, is $50,000—less than both copyright litigation and other forms of alternative dispute resolution.[60]

The high cost of copyright litigation is also exacerbated by the unusually long and time-consuming disposition of copyright cases. As a result, attorneys are frequently unwilling to risk litigating intellectual property cases on a contingency fee basis.[61] As one scholar has noted, mediation reduces "expensive and extensive discovery . . . because the issues to discover are narrowed early in the process."[62] Moreover, the prospect of mediation may encourage a lawyer or law firm to justify taking a copyright case, as "the likelihood of a quicker resolution . . . may allow more lawyers or firms to accommodate individual plaintiffs with contingency fee arrangements" and other payment plans.[63]

B. *The Ability to "Share" Copyrighted Works*

1. *Copyrighted Works as "Public Goods"*

An additional benefit to copyright mediation is the unique ability of parties to "share" copyrighted works.[64] This notion is perhaps best illustrated by classifying the various types of property that may be the subject of mediation into two categories—"private goods" and "public goods." According to contemporary economic theory, a commodity is a "private good" when (1) its owner can exclude a non-owner from consuming the commodity—a concept known as "excludability;" and (2) consumption of the good necessarily prevents its

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[58] Judith A. Szepesi, *Maximizing Protection for Computer Software*, 12 COMPUTER & HIGH TECH. L.J. 173, 199–200 (Feb. 1996) (footnotes omitted) (citing AM. INTELL. PROP. L. ASSOC. COMMITTEE ON ECON. OF LEGAL PRAC., REP. OF ECON. SUR. 1995, at 63).

[59] *Id.* at 200.

[60] *Id.* ("Estimated median costs for alternative dispute resolution are: $50,000 for mediation; $78,000 for med/arb; $100,000 for mini-trial; $150,000 for summary jury trial; $151,000 for binding arbitration.").

[61] P.L. Skip Singleton, Jr., *Justice for All: Innovative Techniques for Intellectual Property Litigation*, 37 IDEA 605, 608 (1997) (quoting a patent attorney).

[62] Blackmand & McNeill, *supra* note 7, at 1729 n.138.

[63] *Id.* at 1723.

[64] The "sharable" nature of copyrighted works is posited in Blackmand &McNeill, *supra* note 7, at 1716.

consumption by another party—a concept known as "rivalry."[65] If both conditions are perfectly satisfied, such commodities are designated "pure private goods."[66]

Pure public goods, by contrast, are perfectly non-excludable and non-rival commodities, such that the owner of the commodity cannot prevent a non-owner from consuming the existing good and consumption of the good does not prevent its consumption by another.[67] Thus, "[p]ublic goods are commodities for which the cost of extending the service to an additional person is zero and for which it is impossible to exclude individuals from enjoying."[68] The classic example of a perfectly non-excludable and non-rival public good is a lighthouse; ships entering a harbor cannot be excluded from consumption of the light, and consumption of the light by one ship will not preclude consumption by another ship.[69]

Although most commodities are pure private goods, intellectual property rights, such as copyrights and patents, generally fall within the ambit of "public goods."[70] Thus, an owner of an otherwise copyrightable work cannot—absent legal protection—exclude a non-owner from consuming the artistic expression (assuming the market availability of the work) and consumption of the artistic expression does not prevent its consumption by another.[71]

The import in classifying works of intellectual property as "public goods" is to observe that, although the government can alter the non-excludable nature of a work by affording it copyright protection, the government is incapable of altering the non-rival nature of such works.[72] Hence, consumption of a copyrighted work

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[65] *See* PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 372 (17th ed. 2001).

[66] *Id.*

[67] *Id.* Pure public goods are "ones whose benefits are indivisibly spread among the entire community, whether or not individuals desire to purchase the public good." *Id.*

[68] *Id.* at 37.

[69] *Id.* at 37–38.

[70] *Id.* at 579.

[71] *Id.* ("Governments increasingly pay attention to intellectual property rights, such as patents and copyrights, to provide adequate market rewards for creative activities.").

[72] An additional reason to classify copyrighted works as "public goods" is to observe that markets traditionally fail to support the production of such goods because their non-excludable nature allows for cost-free consumption. As no consumer can be excluded from consumption, it benefits any consumer to let others invest the time, money, and labor into the creation of copyrightable works. Because all consumers reason in this manner, works of creative expression will rarely be created even though such works benefit consumers generally. Such a quandary—known as the "free rider" dilemma—thus provides authors with insufficient market incentive to create works of intellectual property absent legal protection. As a result, "[e]fficient provision of public goods often requires government action, while private goods can be efficiently allocated by markets." *Id.* at 372. The Copyright Act, as a form of such government

by one party—even notwithstanding the Copyright Act—does not prevent consumption of the work by another. Precisely because of this non-rival nature, copyrighted works provide a unique advantage to mediating copyright disputes—namely, the ability of parties to license or otherwise "share" copyrighted works without diminishing the extent to which the other party may consume such works. As a result, "resolution of intellectual property disputes does not require an 'either/or' result in which one party walks away with all the rights at issue."[73]

In the case of an undisputed copyright owner, the incentive to "share" protected works is realized through agreements in which the owner enjoys a pecuniary gain—typically in the form of a licensing agreement or a joint venture.[74] Given the litigation costs averted by such an agreement, the copyright owner may also be willing to confer such a license at a reduced cost. This reduced cost, coupled with the risk and expense of litigation, thus provides incentive for the non-owner to assent to such an agreement as well. To be sure, each party will—and, indeed, should—engage in such a cost-benefit analysis in determining the propriety of a proposed agreement. The key is that the cost and risk of litigation are factors to be considered within that analysis.[75]

2. *Illustration of Copyright "Sharing"*

The ability to "share" copyrighted works is perhaps no better illustrated than in the complex array of licensing agreements spawned in the aftermath of the Napster litigation.[76] Napster, which closed its Internet music service after unsuccessful defenses to allegations of contributory and vicarious copyright infringement, recently entered into licensing agreements with numerous independent labels, such as Vitaminic, Matador, and Beggars Banquet.[77]

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action, transforms copyrightable works into commodities from which owners can exclude non-owners, thereby creating incentive for the creative process and resolving the free rider problem.

[73] Blackmand & McNeill, *supra* note 7, at 1716.

[74] *Id.* at 1717 ("[A] a mediator or arbitrator experienced in the relevant law, technology, or industry may be able to help find a unique solution appropriate to the particular situation, such as a special licensing arrangement or a joint venture.").

[75] Indeed, when determining whether mediation is appropriate for resolution of a copyright dispute, parties should consider mediation against the alternative of litigation, rather than viewing it in a vacuum. In other words, disputants should not compare the rights conceded at mediation against the state of affairs before the dispute occurred (which might eviscerate the very creative incentive that copyright aims to foster), but rather in relation to the cost and risk associated with litigation.

[76] *See* Jefferson Graham, *A Slimmed-Down Napster Gets Back Online; Trial Run Is Heavy on Little-Known Artists*, USA TODAY, Jan. 10, 2002, at D1.

[77] *Id.* Napster's inability to reach settlement with the plaintiffs in *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), has rendered a post-litigation landscape in which

Moreover, Zomba, a top-selling independent music label, agreed to license its music to subscription-music venture MusicNet, which is backed by RealNetworks Inc., AOL Time Warner, EMI Group PLC, and Bertlesmann.[78] Indeed, some scholars have speculated that such companies, in an attempt to make Internet music services more palatable, will offer downloadable packages that include exclusive music, videos, and photographs available only through the recording studios and artists—an endeavor that will require the additional "sharing" of copyrighted material.[79]

C. *Mediation as a Means of Circumventing Ambiguous and Adverse Copyright Issues*

1. *Mediating Ambiguous Issues in Copyright Law*

As the development of law remains one step behind advancements in technology, "multimedia distributors and others disseminating content over the Internet are often sailing on uncharted waters when it comes to assessing their liability exposures."[80] Further, given "the enormous financial stakes in the resolution of such rights, copyright disputes are increasingly finding their way into the courtroom."[81] Thus, the dual problem of uncertainty in copyright law and the influx in copyright technology cases raises concerns for both copyright disputants and accommodating courts.[82]

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the company has little bargaining power in settlement discussion with other plaintiffs. One recent settlement calls for Napster to pay $26 million to publishers and songwriters, along with an unspecified percentage of the money Napster takes in when it opens as a paying service. Jon Healey, *Napster, Publishers in Tentative Settlement*, L.A. TIMES, Sept. 25, 2001, at C6 ("If found liable for violating the publishers' copyrights, Napster would have faced far more than $26 million in damages. But [a plaintiff's attorney] said, 'We made a pragmatic decision that we should settle on terms that Napster could afford to pay.'").

[78] *Ex-Bertelsmann Executive is Named CEO of Napster*, THE WALL ST. J., July 25, 2001, at B4.

[79] Interview by Roger McCoy of WBNS-10TV with Sheldon W. Halpern, Professor, The Michael E. Moritz College of Law at The Ohio State University, in Columbus, Ohio (Jan. 24, 2002).

[80] 2002 Law Topics, *available at* http://www.2001law.com/topic_52.htm (last visited March 28, 2002).

[81] *Id.*

[82] One use of alternative dispute resolution in technology-related copyright disputes is the on-line mediation of Internet disputes:

> A recent *Wall Street Journal* article discussed book publishers' support for a system of electronic coding for books. Such a device would alert the copyright holder of unauthorized copying. In fact, technology already exists that can detect copyright

Napster's recent "fair use" defense[83] to allegations of contributory and vicarious copyright infringement is illustrative of the ambiguity in copyright technology cases. Ultimately rejecting this defense in *A&M Records v. Napster, Inc.*,[84] the Ninth Circuit Court of Appeals affirmed an injunction ordering Napster to remove all infringing files from its file-sharing system.[85] As a result, the post-litigation landscape is one in which Napster has little leveraging power, a diminishing trade name, and little choice but to negotiate for such licenses in on-going settlement discussions.[86]

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violations of digital images. But as history teaches us, encryption software is not always an effective solution because "for every encryption algorithm invented, there's a hacker who'll break it." In addition, there was a suggestion by the Georgetown University's Cyberspace Law Institute for a court system for the Internet. Such a system, called "Digital Mediation Board" of "virtual magistrates," would exist to respond quickly to claims of on-line copyright infringement. Because there is little available case law regarding the Internet, Congress should consider such a system in greater detail as a more focused way to address questions of copyright infringement.

June Chung, *The Digital Performance Right in Sound Recordings Act and Its Failure to Address the Issue of Digital Music's New Form of Distribution*, 39 ARIZ. L. REV. 1361, 1388 (1997) (citations omitted).

[83] Specifically, "Napster identifie[d] three specific alleged fair uses: sampling, where users make temporary copies of a work before purchasing; space-shifting, where users access a sound recording through the Napster system that they already own in audio CD format; and permissive distribution of recordings by both new and established artists." A&M Records v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001).

[84] *Id.* Contributory infringement occurs when "one . . . with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another . . . ." Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971); *see also* Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996). Thus, contributory infringement exists when one engages in "personal conduct that encourages or assists the infringement" of another. Matthew Bender & Co. v. West Publ'g Co., 158 F.3d 693, 706 (2d Cir. 1998), *rev'd*, 41 Fed. Appx. 507 (2d Cir. 2002).

Vicarious infringement, on the other hand, "is an 'outgrowth' of respondeat superior." *Napster*, 239 F.3d at 1022 (quoting *Fonovisa*, 76 F.3d at 262). "In the context of copyright law, vicarious liability extends beyond an employer/employee relationship to cases in which a defendant 'has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.'" *Id.* (quoting *Gershwin*, 443 F.2d at 1162); *see* Polygram Int'l Publ'g, Inc. v. Nevada/TIG, Inc., 855 F. Supp. 1314, 1325–26 (Mass. Dist. Ct. 1994).

[85] As of February 2001, "Napster had 80 million registered users who downloaded as many as 3 billion songs each month." Graham, *supra* note 76, at D1. In the aftermath of the Ninth Circuit's decision, however, the company "doesn't have much of a chance without offering music from major labels. 'The Napster brand isn't enough' . . . 'And the value of their brand name has diminished every day.'" *Id.* (quoting GartnerG2 analyst P.J. McNealy).

[86] *See id.* ("The five major labels are still suing Napster for copyright infringement, and [a Napster official] is still trying to both settle the cases and persuade labels to license their music to the new Napster.").

In addition, MP3.com, a Napster-esque Internet music service, recently filed a $175 million malpractice claim against its attorneys for defective fair use advice after losing a lawsuit over its music sharing service.[87] According to the lawsuit, Silicon Valley-based law firm Cooley Godward advised MP3.com that its service, "My.MP3.com," qualified as a copyright "fair use."[88] This argument was rejected in *UMG Recordings, Inc. v. MP3.com, Inc.*,[89] in which a New York district court characterized the fair use defense as a "sham" that did "not meet a single one of the legal tests for 'fair use.'"[90]

The *MPC.com* litigation yet again exemplifies the degree of risk and financial burden that copyright parties incur at trial and on appeal, as well as illustrating the threat that lawyers may encounter in such disputes—indeed, not only for malpractice, but also in losing clientele due to adverse litigation outcomes. Mediation provides a means of evading such perils, and circumvents a wide range of other copyright issues in which parties and attorneys incur similar risks and financial burdens.[91]

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[87] The American Bar Association, *available at* http://www.abanet.org/journal/ereport/f1mp3.html (last visited March 13, 2002); *see* UMG Recordings, Inc. v. MP3.com, Inc., No. 00 Civ. 472 JSR, 2000 U.S. Dist. LEXIS 13293, at *10–19 (S.D.N.Y. Sept. 6, 2000). MP3.com filed the malpractice claim against Cooley Godward after a Universal Music Group subsidiary won a 53 million-dollar judgment against the company in November 2000. Jon Healey, *MP3.com Sues Former Copyright Counsel*, L.A. TIMES, Jan. 19, 2002, § 3, at 2. The Universal subsidiary "bought MP3.com six months later for $372 million, a bargain-basement price compared with the company's peak market value of more than $2 billion . . . . At least five copyright-infringement lawsuits are pending against the company." *Id.*

[88] Accordingly to lawyers for MP3.com, the malpractice claim "is the largest legal malpractice case ever filed in California . . . . The lawsuit seeks to recover some of that lost value, along with the money MP3.com has paid to record labels, music publishers and attorneys—plus punitive damages." *Id.*

[89] *UMG Recordings*, 2000 U.S. Dist. LEXIS 13293, at *19.

[90] 2002 Law Topics, *available at* http://www.2001law.com/topic_52.htm (last visited March 28, 2002) (quoting *MP3.com*, 2000 U.S. Dist. LEXIS 13293, at *10–11).

[91] *See, e.g.*, *supra* note 57 (discussing the ambiguity surrounding the "inverse ratio rule" and the "idea-expression" dichotomy). Indeed, many international bodies recognize mediation as a viable means of dispute resolution in copyright cases. Article 48 of the 1991 Chinese copyright law, for example, provides for mediation in copyright infringement disputes. COPYRIGHT LAW OF THE PEOPLE'S REPUBLIC OF CHINA art. 48 (adopted by Standing Comm., 7th Nat'l People's Cong., 15th Sess., Sept. 7, 1990, promulgated by Pres. Order No. 31, Sept. 7, 1990) *reprinted in* 3 LAW AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA GOVERNING FOREIGN-RELATED MATTERS (1949–1990), at 1800; William Grantham, *The Arbitrability of International Intellectual Property Disputes*, 14 BERK. J. INT'L LAW 173, 204 (1996); *see also* Christian L. Broadbent & Amanda M. McMillian, *Other International Issues: Russia and the World Trade Organization: Will TRIPS be a Stumbling Block to Accession?*, 8 DUKE J. COMP. & INT'L L. 519, 547 (1998) ("While Russian laws allow owners of exclusive copyrights and related rights to resort to the legal, arbitration, or mediation system and include legal remedies

2. *Mediating Copyright Disputes to Overcome Adverse Issues*

Parties to copyright disputes also frequently assume the unenviable charge of litigating cases in which the chance for success is unpromising or the potential for recovery minimal. Such situations often arise when the procedural or substantive copyright law is unfavorable to the underlying facts of a party's case.[92] One means of overcoming such adversity is by mediating the dispute before the adverse facts are exposed to a judge or jury (or the opposing party).

An example of an issue that may adversely effect a plaintiff's recovery potential is whether (and when) a work is registered with the United States Copyright Office. Although registration of a work is not required to secure copyright protection, section 412 of the Copyright Act requires that copyrighted works be registered prior to the commencement of litigation as a jurisdictional prerequisite.[93] Section 412 also prohibits the copyright owner from receiving either statutory damages ($500 to $20,000 per act of infringement) or attorneys' fees if the works were not properly registered within the relevant time period.[94]

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for the violation of copyright laws, the application of such laws has apparently been less than admirable."); Mark S. Lee, *Japan's Approach to Copyright Protection for Computer Software*, 16 LOY. L.A. INT'L & COMP. L.J. 675, 688–89 (1994) ("Japan's Copyright Act includes informal mediation procedures under the auspices of the Director General of the Cultural Affairs Agency, the government agency responsible for supervising copyrights.").

[92] The legislative history to the Copyright Act "makes clear that what was intended by the provision for statutory damages was a minimum recovery for those infringement suits in which it was impossible for the copyright owner to prove actual damages." Robert W. Phillips, Cass County Music Co. v. C.H.L.R., Inc.: *Law, Equity, and the Right to Jury Trial in Copyright Infringement Suits Seeking Statutory Damages*, 51 ARK. L. REV. 117, 140–41 (1998).

[93] Bauer Lamp Co. v. Shaffer, 941 F.2d 1165, 1171 (11th Cir. 1991); *see* Demetriades v. Kaufmann, 680 F. Supp. 658, 661 (S.D.N.Y 1988) ("Receipt of an actual certificate of registration or denial of [the] same is a jurisdictional requirement, and this court cannot prejudge the determination to be made by the Copyright Office.").

[94] Section 412 of the Copyright Act provides:

> In any action under this title, other than an action brought for a violation of the rights of the author under section 106A(a) or an action instituted under section 411(b), no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for—
> (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration; or
> (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

17 U.S.C. § 412 (2000); *see* Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc., 609 F. Supp. 1325, 1330 (E.D. Pa. 1985); Mason v. Montgomery Data, Inc., 741 F. Supp. 1282, 1285 (S.D. Tex. 1990), *rev'd*, 967 F.2d 135 (5th Cir. 1992) ("Furthermore, where the alleged

Given the foregoing, assume that a copyright dispute arises between a manufacturer of business apparel and a local distributor. The local distributor, despite its single-store operation, has expanded its service to the Internet, where it advertises and sells apparel using the manufacturer's copyrighted pictures and logos. The manufacturer, capable of selling its own apparel on the Internet, seeks to enjoin such activity and, after registering the works, files suit against the local distributor for copyright infringement. Unknown to the local distributor, however, the manufacturer failed to register the works within the relevant time period. As a result, the manufacturer is only entitled to damages equivalent to the distributor's profits; it is barred from recovering statutory damages or attorneys' fees.[95] Further, the on-line profits from the apparel are negligible and no doubt insufficient to cover the manufacturer's legal fees. The copyright owner is thus left in the quandary of incurring substantial litigation costs with the potential for only minimal recovery or permitting the distributor to engage in infringing activity (in which other distributors are likely to engage if the manufacturer takes no action).

Mediation, as a forum in which such works may be "shared," is thus a valuable option for the manufacturer—particularly if the distributor is unaware of the defective registration or its legal effect. Provided the distributor is so uninformed, the manufacturer is not limited by the distributor's profits in mediation as he or she would be at trial. Moreover, absent a good faith argument that the distribution agreement afforded the distributor a license to use the copyrighted works on-line, the distributor has little chance of prevailing at trial. As a result, the distributor also has incentive to resolve the dispute through mediation.

D. *Mediation as a Means of Preserving Business Relationships and Reputations*

Although a common benefit to mediating disputes of all types, the preservation of business relationships and reputations is more often advantageous to disputants in intellectual property cases because of the business associations that often exist among the parties.[96] This preservation stems from both the

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infringing activity commences prior to the registration of a copyright, the copyright claimant may not claim statutory damages for continued post-registration activity.").

[95] *See* 17 U.S.C. § 411.

[96] *See* Nancy Neal Yeend & Cathy E. Rincon, *ADR and Intellectual Property: A Prudent Option*, 36 IDEA 601, 603 (1996). With respect to patents, legal issues frequently "arise between parties that otherwise have, or likely may have, an ongoing relationship, whether or not it is related to the patent issues." Blackmand & McNeill, *supra* note 7, at 1724. Similarly, trademark disputes often involve parties that have an on-going business relationship. *See*

"opportunity to use a mechanism that is much less formal and less aggressive than litigation" and the fact that "[a]t the conclusion of mediation, the parties can both claim ownership of the resolution."[97] Mediation also affords businesses the advantage of resolving disputes in a swift manner, thereby avoiding interference with day-to-day business operations and profit-making capabilities.[98]

By way of example, assume that the business relationship between the manufacturer and distributor has been profitable in the past. The onset of litigation will likely mean the end of the relationship and substantially harm the reputation of each company. For the distributor, the dilemma is aggravated because the manufacturer is a renowned brand name that comprises a significant portion of the store's sales. For the manufacturer, the situation is escalated by the distributor's irreplaceable reputation in the market and geographic location within the community.

As a means of avoiding even short-term impairment of this relationship, mediation affords the parties a process by which to amicably resolve the dispute. The desire of copyright disputants to preserve their business relationships may also arise in a variety of other situations, such as in the context of an existing franchise covenant or a valued license agreement unrelated to the dispute.[99] Whatever the circumstances, mediation offers copyright parties the ability to preserve and often strengthen their business relationships and reputations.

E. *The Use of Evaluative Mediators in Copyright Disputes*

As previously discussed, the use of evaluative techniques in mediation has proliferated in recent years as lawyers and retired judges have increasingly undertaken the role of mediator.[100] Such evaluative techniques are particularly apt for intellectual property cases, as they "often challenge the legal system with their complicated, technical nature."[101] Although "the parties may need to spend a significant amount of time, effort, and money 'teaching' the relevant technology

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CENTER FOR PUB. RESOURCES AND THE INT'L TRADEMARK ASSOC., ADR IN TRADEMARK AND UNFAIR COMPETITION DISPUTES: A PRACTITIONER'S GUIDE III-5 (William A. Finkelstein ed., 1994).

[97] Blackmand & McNeill, *supra* note 7, at 1714, 1724 (citing INSTITUTE FOR DISPUTE RESOLUTION, CENTER FOR PUBLIC RESOURCES, INC., CPR MODEL ADR PROCEDURES AND PRACTICES: MEDIATION I-1, I-4 (1995)).

[98] *Id.*; *see* Campbell Killefer, *Negotiating ADR Provisions in Corporate Transactions*, CCM: AM. LAW. CORP. COUNS. MAG., Apr. 1995, at 60A.

[99] Blackmand & McNeill, *supra* note 7, at 1726.

[100] *See supra* Part II.A.2 (distinguishing between facilitative and evaluative mediation techniques).

[101] Blackmand & McNeill, *supra* note 7, at 1716.

to a lay judge or jury, the selected [neutral third party] usually will not require nearly as much education."[102]

In the case of evaluative mediation, parties may benefit from a copyright mediator's ability to estimate the worth of a party's case or evaluate the likelihood of a party's success at trial.[103] Parties to copyright disputes may also select evaluative mediators with corporate backgrounds to suggest creative business solutions that might otherwise be overlooked. In this manner, mediation affords parties the opportunity to select a neutral third party based on experience, education, and mediation style—an option not available to parties at trial.

IV. THE INFREQUENT USE OF MEDIATION IN COPYRIGHT DISPUTES

In light of the array of advantages associated with mediating copyright disputes, mediation remains a curiously underutilized means of resolving copyright cases. This section accounts for the infrequent use of mediation through a traditional "descriptive-normative" dichotomy. As a descriptive matter, that is, one may speculate why mediation is less frequently used as an alternative to copyright litigation than other types of disputes. As a normative matter, on the other hand, one may speculate why mediation should or should not be used as an alternative to copyright adjudication. This section explores each side of the dichotomy, and offers critical analysis of the arguments for the non-use of mediation in copyright disputes.

A. *Reasons for the Infrequent Use of Mediation in Copyright Disputes—"The Three Myths"*

Accounting for the absence of a policy or procedure in a given field is, to some extent, always conjecture. Nevertheless, the infrequent use of mediation in copyright disputes can be explained, at least in part, by three myths: (1) the myth that parties want their "day in court;" (2) the myth that parties must disclose confidential information during mediation; and (3) the myth that clients benefit from adversarial representation.

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[102] *Id.* at 1717 (discussing the use of arbitrators in technology disputes).

[103] *Id.*

1. *The Myth That Parties Want Their "Day in Court"*

One explanation for the infrequent use of mediation in copyright disputes is the belief that copyright disputants want their "day in court."[104] As a result, lawyers frequently presume that clients will be dissatisfied with the mediation process and, consequently, abstain from recommending mediation as an alternative to litigation. Contrary to this belief, parties have historically expressed a greater desire to resolve their disputes in an expeditious and inexpensive manner.[105] Many disputants also perceive such an appearance as a "devastating and embarrassing day," the fear of which "turns many [prospective litigants] away from pursuing their civil remedies."[106] Finally, mediation is frequently considered a "cathartic equivalent" to a "day in court," as it "offer[s] parties the first opportunity to express their point of view in the presence of others and be heard by the other party . . . ."[107]

2. *The Myth That Parties Must Disclose Confidential Information*

An additional myth of copyright mediation is that parties must disclose confidential information during the negotiation process. As a result, copyright disputants may be reluctant to mediate for fear that adverse parties may use the

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[104] Joe Robertson, *Mediation Still Not Popular Among Some Lawyers,* TULSA WORLD, Aug. 30, 1998, at A1 (stating that mediation "goes too far and encroaches on the rights of people who are entitled to their day in court").

[105] Craig McEwen, *Note on Mediation Research, in* GOLDBERG, *supra* note 10, at 182) ("Empirical research about mediation . . . indicates that . . . [d]isputants engaged in mediation tend to be satisfied with the process and typically are more likely to be so than comparable litigants experiencing other processes such as trial or negotiation.").

[106] As one scholar has noted, "the poor may be more likely to take part in proceedings that are compromise-seeking in nature, rather than those that are adversarial . . . . One solution to this problem is to provide the poor with the information and the forum to engage in alternative dispute resolution." Omar J. Arcia, *Objections, Administrative Difficulties and Alternatives to Mandatory Pro Bono Legal Services in Florida*, 22 FLA. ST. U. L. REV. 771, 793 (1995).

[107] Thomas J. Stipanowich, *The Quiet Revolution Comes to Kentucky: A Case Study in Community Mediation,* 81 KY. L.J. 855, 871 (1993). Moreover, "an attendance requirement is consistent with the principles of ADR, reducing coercion, strengthening the feeling of having had one's day in court . . ." James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171, 181–82 (2001). Indeed, "mediation can provide superior opportunities for catharsis to court hearings," as "overly formalistic proceedings in court may discourage parties from articulating their concerns." Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?*, 1998 BYU L. REV. 1305, 1324 n.85 (citing Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2688 (1995)).

process to obtain discovery. Such parties may believe (and properly so) that although communications in mediation are generally confidential, a party may disclose information that an adversary, once aware of its existence, may thereafter obtain by another legal avenue. Nevertheless, the voluntary nature of mediation affords lawyers a means of safeguarding against such activity by simply refusing disclosure.[108] Indeed, the very ability of parties to prevent the disclosure of such information provides parties with one of the principle advantages to mediation—that is, the ability to prevent disclosure of confidential information that might otherwise be exposed at trial.[109]

3. *The Myth That Clients Benefit from Adversarial Representation*

The final reason for the infrequent use of mediation in copyright disputes is the general aversion of intellectual property lawyers to the mediation process. This aversion may derive from the false perception that resolving disputes through mediation reflects poorly on the ability of an attorney to "win" a given case or is otherwise contrary to his or her general practice of adversarial representation. Given a lawyer's primary responsibility in securing the client's objectives, however, such representation often leaves clients in an inferior position than if mediation had been given due consideration.[110]

B. *Normative Arguments Against Copyright Mediation*

The normative arguments against copyright mediation are, to a large extent, merely restatements of arguments against mediation in general. These arguments generally suggest that: (1) widespread copyright mediation would stifle the development of copyright law; (2) copyright plaintiffs are deprived of "justice" through the mediation process; and (3) mediation precludes copyright

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[108] *See* Blackmand & McNeill, *supra* note 7, at 1720 ("Unlike a trial, ADR allows the parties to determine for themselves the degree to which such information will or will not be made publicly available.").

[109] One situation in which the confidentiality of mediation may prove useful to intellectual property disputants is unfair competition cases involving trade secrets. *Id.* ("ADR also provides the parties with the opportunity for far greater protection of trade secrets and other proprietary or sensitive information during the proceeding itself.").

[110] *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1999) ("A lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued. . . . A lawyer shall abide by a client's decision whether to settle a matter.").

adjudication of "bet the company" situations or disputes of great social importance.[111]

1. *The Argument That Mediation Would Stifle the Development of Copyright Law*

The seemingly natural consequence of mediating copyright disputes is a reduction in the number of copyright decisions issued by federal courts. If sufficiently widespread, this phenomenon may become problematic for legal areas, such as copyright law, where the legal boundaries are often ill defined. As a result, some scholars have concluded that mediation "should be treated . . . as a highly problematic technique for streamlining dockets,"[112] thereby allowing federal courts to clarify and further develop the law.[113]

The foregoing argument is unpersuasive on two grounds. First, copyright practitioners assume an ethical obligation to prioritize their client's legal objectives over securing general developments in the law.[114] Thus, a copyright practitioner representing a low-budget client in an ambiguous "fair use" dispute should suggest mediation in lieu of attempting to clarify the bounds of the "fair use" issue at trial. Second, the widespread use of mediation in copyright disputes would not reduce the number of decisions historically issued by federal courts because of the recent increase in copyright case filings.[115] Accordingly, the argument that widespread mediation of copyright disputes would stifle the development of copyright law is unconvincing, both from the litigant's perspective and as a matter of policy.

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[111] *See* Blackmand & McNeill, *supra* note 7, at 1711 n.3 ("Other instances where ADR may not best serve clients' interests include cases involving unsettled areas of law and situations where a client has a significant procedural advantage in litigation."); Steven J. Elleman, *Problems in Patent Litigation: Mandatory Mediation May Provide Settlement Solutions*, 12 OHIO ST. J. ON DISP. RESOL. 759, 773 (1997); Campbell Killefer, *Negotiating ADR Provisions in Corporate Transactions*, AM. LAW. CORP. COUNS. MAG., Apr. 1995, at 61A.

[112] Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

[113] *Id.* at 1085 ("A settlement will thereby deprive a court of the occasion, and perhaps even the ability, to render an interpretation. A court cannot proceed (or not proceed very far) in the face of a settlement.").

[114] *See* MODEL RULES R. 1.2(a).

[115] 2002 Law Topics, *available at* http://www.2002law.com/topic_52.htm (last visited March 28, 2002) ("[C]opyright disputes are increasingly finding their way into the courtroom.").

2. *The Argument That Copyright Plaintiffs are Deprived of "Justice" Through Mediation*

Perhaps the most common argument voiced by skeptics of mediation is "that justice cannot and should not be reduced to a negotiation process."[116] Proponents of such an argument opine that "[a]lthough the parties are prepared to live under the terms they bargained for, and although such peaceful coexistence may be a necessary precondition of justice, and itself a state of affairs to be valued, it is not justice itself."[117] Such injustice, it is argued, frequently results from an imbalance in bargaining power, such as when an employee seeks damages from a large corporation for work-related injuries.[118] In such a case, "the distribution of financial resources, or the ability of one party to pass along its costs, will invariably infect the bargaining process, and the settlement will be at odds with a conception of justice that seeks to make the wealth of the parties irrelevant."[119]

Despite the force of this argument, its reasoning is problematic in three respects. First, the alleged "drawbacks" of mediation should not be critiqued in a vacuum, but rather in relation to the alternative. So viewed, the same power imbalance that skeptics allege thwarts the legitimacy of mediation also plagues the litigation process. Second, even presuming a greater power imbalance in mediation than in litigation, the imbalance is less problematic in copyright disputes where parties are often sophisticated commercial businesses.[120] Finally, such arguments fail to address the reality that mediation is driven by self-interest, measured by cost-benefit analysis, and frequently a means of obtaining superior, more workable remedies than litigation. Indeed, as one scholar has noted, "our

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[116] Fiss, *supra* note 112, at 1085 ("Parties might settle while leaving justice undone. The settlement of a school suit might secure the peace, but not racial equality.").

[117] *Id.* at 1085–86.

[118] *Id.* at 1076; *see* Christine Rack, *Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the Metro Court Study*, 20 HAMLINE J. PUB. L. & POL'Y 211, 211 (Spring 1999) ("First, if gender and ethnic minority disputants are particularly susceptible to the mediation environment and more responsive to its ideological influence, they may consent to disadvantageous outcomes.").

[119] Fiss, *supra* note 112, at 1076; *see* Rack, *supra* note 118, at 217.

[120] For a general discussion of the bargaining power of copyright parties in mediation, see Matthew C. Lucas, *The De Minimis Dilemma: A Bedeviling Problem of Definitions and a New Proposal for a Notice Rule*, 4 J. TECH. L. & POL'Y 2, 48 (Fall 1999) (noting that, under certain circumstances, "copyright owners [have] a certain amount of leverage in the negotiation process that may work to level the playing field").

very conception of what constitutes justice may change as we observe the kind of law that emerges from uncoerced individual choice."[121]

3. *The Argument That Mediation Precludes Copyright Adjudication of "Bet the Company" Situations or Disputes of Great Social Importance*

The final argument against mediation is that "bet the company" situations or cases of great social importance should not be reduced to the negotiation process. As critic Owen Fiss observed, "[t]he settlement of a school suit might secure the peace, but not racial equality . . . . I am willing to assume that no other country . . . has a case like *Brown v. Board of Education* in which the judicial power is used to eradicate the caste structure . . . [and] this should be a source of pride rather than shame."[122] Such proponents may also argue that copyright cases of great social and cultural importance are more apt for adjudication than settlement through the mediation process.

This argument is compelling as a matter of policy. Copyright cases such as *Feist Publications, Inc. v. Rural Telephone Service Co.*,[123] in which the Supreme Court demarcated the originality requirement for copyright protection, and *Sony Corp. of America v. Universal City Studios, Inc.*[124] in which the Court provided its first real attempt to delineate the "fair use" defense, are decisions for which mediation would have indeed proven unfortunate. Notwithstanding a case's social value, however, this argument ignores that the social importance of a copyright case is frequently ascertainable only in hindsight and that mediation may still provide a superior means of resolution from the litigant's perspective. Nevertheless, the use of mediation in "bet the company" situations—where "principles . . . go beyond the immediate dispute to affect a company's market position"—is often an inadequate long-term means of resolution.[125] At bottom, therefore, the circumstances under which copyright disputes are appropriate for mediation remain, thus far, unclear.

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[121] David G. Post, *Governing Cyberspace*, 43 WAYNE L. REV. 155, 167 (Fall 1996)); *see* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 29 (1988) (noting that parties view mediation as fairer when they retain control of the outcome).

[122] Fiss, *supra* note 112, at 1085, 1089.

[123] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

[124] Sony Corp. of Am. v. Universal Studios, Inc., 464 U.S. 417 (1984).

[125] *See supra* note 111.

V. AN APPROACH FOR DETERMINING THE CIRCUMSTANCES UNDER WHICH MEDIATION IS APPROPRIATE FOR RESOLVING COPYRIGHT DISPUTES

A. *Factors to Consider When Selecting Copyright Cases for Mediation*

The factors that parties should consider when selecting copyright cases for mediation are merely a coalescence of the arguments espoused throughout this article.[126] Parties to copyright disputes should consider mediation when (1) the costs of litigation would be unmanageably high;[127] (2) there is a potential for copyright "sharing";[128] (3) the litigation outcome is especially difficult to predict;[129] (4) the legal precedent is adverse to the underlying facts of a party's case;[130] (5) litigation may harm the business relationships or reputations of the parties;[131] (6) the dispute may require a specialized understanding of copyright law;[132] or (7) the circumstances do not give rise to a "bet the company" situation.[133] These factors must be evaluated in the context of how each bears on the ultimate question of whether mediation is in a party's interest.

Noticeably absent from these factors are two characteristics, which, if present, may indicate the *impropriety* of mediation. First, if a copyright dispute has already been adjudicated and is pending appeal, the prevailing party may no longer have incentive to participate in mediation. Even so, mediation may be

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[126] As some scholars note, "[p]arties especially should consider ADR, with the advice of counsel, when: (1) they have a sufficient understanding of the case, either through discovery or other means; (2) when it seems a dispute can or should be settled; or (3) when trial costs may be prohibitively high. ADR also provides advantages when parties seek a rapid outcome." Blackmand & McNeill, *supra* note 7, at 1710.

[127] *See supra* Part III.A. The term "costs," as used to determine the expense of litigation, should include everything from attorney fees to profits lost due to a preliminary injunction or a severed business relationship.

[128] *See supra* Part III.B. The ability of parties to "share" copyrighted works is frequently realized through licensing agreements and joint ventures.

[129] *See supra* Part III.C.1. The outcome of copyright cases is frequently difficult to predict when the fair use doctrine, the inverse ratio rule, and the idea-expression dichotomy are at issue.

[130] *See supra* Part III.C.2. The fourth factor is germane to the decision of whether a party should suggest mediation irrespective of the other party's knowledge of such adverse precedent or facts.

[131] *See supra* Part III.D. The fifth factor is especially import to intellectual property disputes, where parties frequently maintain business relationships.

[132] *See supra* Part III.E. Evaluative mediation is particularly apt for copyright disputes due to the complex, amorphous nature of intellectual property law and the ability of such mediators to formulate creative business solutions.

[133] *See supra* Part IV.B.3. "Bet the company" situations are often circumstances under which mediation would not satisfy the necessary long-term objectives of the company.

valuable for adjudicated cases in which the cost of the appeal is unduly burdensome or the trial court's remedy inadequate. Second, judges and lawyers involved in copyright disputes should avoid referring copyright cases to mediation when one party lacks settlement authority (or has such limited authority that the mediation would prove futile), as the referral of such cases would frustrate the very expedience that mediation is designed to foster.

Finally, "bet the company" situations are disputes that, as a general rule, should be diverted from mediation, particularly when the client's long-term objectives cannot be satisfied through settlement. In contrast to "bet the company" situations, however, the social and cultural significance of a copyright dispute should be of no consequence to lawyers when selecting cases for mediation (although it may be to judges) because the obligation of copyright practitioners to secure their clients' objectives supercedes any ethical duty to foster developments in the law.[134] Finally, copyright litigation, unlike other areas of law, seldom renders profound decisions of great social importance; rather, its scope is typically limited to commercial matters that are well suited for the mediation process.

B. *Considering Mediation Before Copyright Disputes Arise*

Despite the advantages associated with the foregoing factors, parties are frequently unwilling to agree to mediation in the midst of a dispute.[135] To combat such unwillingness, businesses frequently incorporate mandatory mediation clauses into contracts before such disputes arise—when the parties are more willing to agree to mediation.[136] Under such agreements, parties incur a legal obligation to attend mediation in accordance with the terms of the contract.[137]

Parties drafting mediation clauses should pay close attention to defining what constitutes compliance with the mediation requirement. Drafters concerned with

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[134] *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1999).

[135] GOLDBERG, *supra* note 10, at 478.

[136] The Corporate Counsel Section of the New York State Bar Association, *Legal Development: Report on Cost-Effective Management of Corporate Litigation*, 59 ALB. L. REV. 263, 271–72 (1995) ("Corporations are also seeking to avoid litigation by either negotiating a settlement before litigation begins or using alternative dispute resolution methods. While detailed analysis of the various methods of alternative dispute resolution is beyond the scope of this Report, the Section notes that, depending upon the circumstances, corporations may wish to consider including mandatory arbitration or mediation clauses in contracts.").

[137] The occasion to draft mandatory mediation clauses presupposes that the future disputants had privity with each another before the dispute gave rise. If the disputants were not privy to a business relationship before the dispute, the incentives to mediate are merely those found in Part III.

future disputes over interpretation, for example, may wish to use objective language, such as specifying the duration of the mediation and the information to be exchanged.[138] Other drafters may, at the risk of "open[ing] the door to litigation on compliance issues," opt for a "good faith" participation requirement.[139] Parties should also stipulate the name of the mediator (or a mechanism for naming one),[140] the issues to be covered in the mediation, who will bear the cost of the mediation, and a prohibition against the filing of post-decree motions until the mediation has been completed.[141]

Drafted in this manner, mediation clauses afford parties an effective means of circumventing the aversion to mediation often found in the post-dispute climate. Moreover, such clauses are generally enforceable under contract law[142] (or a more specific statutory directive),[143] and may provide a "basis to dismiss litigation filed by recalcitrant parties or to provide specific enforcement."[144] Finally, empirical studies indicate that the success of mediation is not correlated with voluntary attendance; rather, "disputants . . . compelled to participate in mediation, either by court order or by prior agreement, . . . are as likely to settle as those who agreed to mediate in the midst of a dispute."[145]

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[138] GOLDBERG, *supra* note 10, at 478.

[139] *Id.*

[140] John W. Welch, *Practical Guide to Forming a Partnership in Utah*, 12 BYU J. PUB. L. 111, 134 (1997) ("A mediation provision would provide that the parties enter into good faith negotiations. The role of the mediator would be to smooth the way, reconciling the parties' differences in an attempt to reach a compromise. The mediation clause, like the arbitration clause, must either name a mediator or provide a mechanism for naming one.").

[141] GOLDBERG, *supra* note 10, at 478.

[142] *See* DeValk Lincoln Mercury v. Ford Motor Co., 811 F.2d 326, 338 (7th Cir. 1987); Haertl Wolff Parker, Inc. v. Howard S. Wright Constr. Co., No. 89-1033-FR, 1989 U.S. Dist. LEXIS 14756, at *14–15 (D. Or. 1989).

[143] AMF, Inc. v. Brenchmark Corp., 621 F. Supp. 456, 463 (E.D.N.Y 1985); Kelly v. Benchmark Homes, 550 N.W.2d 640, 646 (Neb. 1996). *But see* Harrison v. Nissan Motor, 111 F.3d 343, 352 (3d Cir. 1997).

[144] GOLDBERG, *supra* note 10, at 478.

[145] *Id.*; *see also* Welch, *supra* note 141, at 134 ("A mediation provision would provide that the parties enter into good faith negotiations. The role of the mediator would be to smooth the way, reconciling the parties' differences in an attempt to reach a compromise. The mediation clause, like the arbitration clause, must either name a mediator or provide a mechanism for naming one.").

VI. CONCLUSION

This Article ends as it began, with a discussion of two themes shared by mediation and the law of copyright—those of incentive and compromise. Given the numerous advantages associated with mediating copyright disputes, mediation is revealed as a valuable alternative to copyright litigation. Consistent with this notion, the grand compromise of copyright law, in which Congress fashions incentive for the creative process by securing copyright to authors while reserving rights of access to the public, provides for the unique ability to "share" copyrighted works through creative compromise. Whatever the incentives, such compromise provides for an invaluable means of bypassing the wide-range of costs associated with copyright litigation and, in the end, encourages the very creative process that the law of copyright attempts to foster.